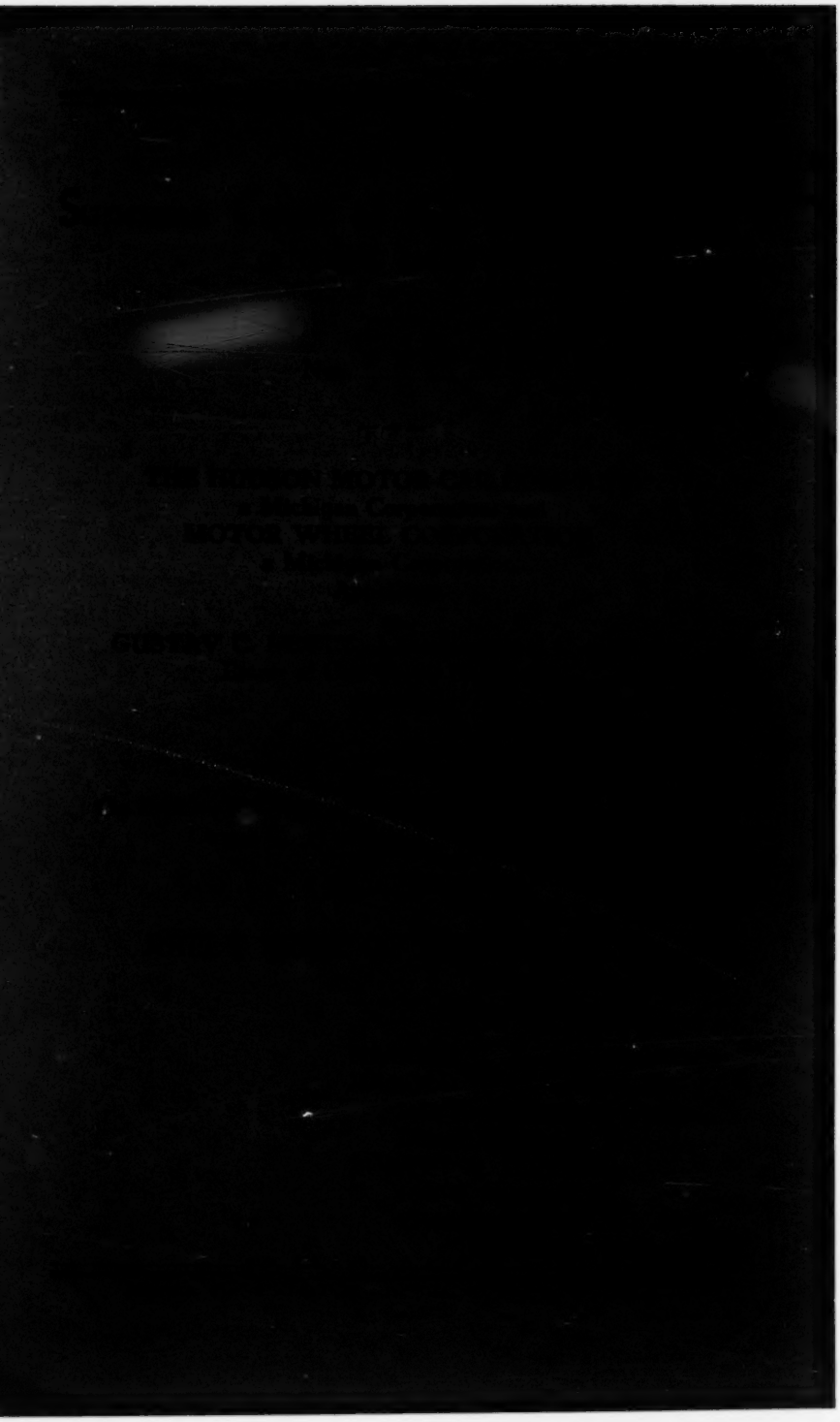

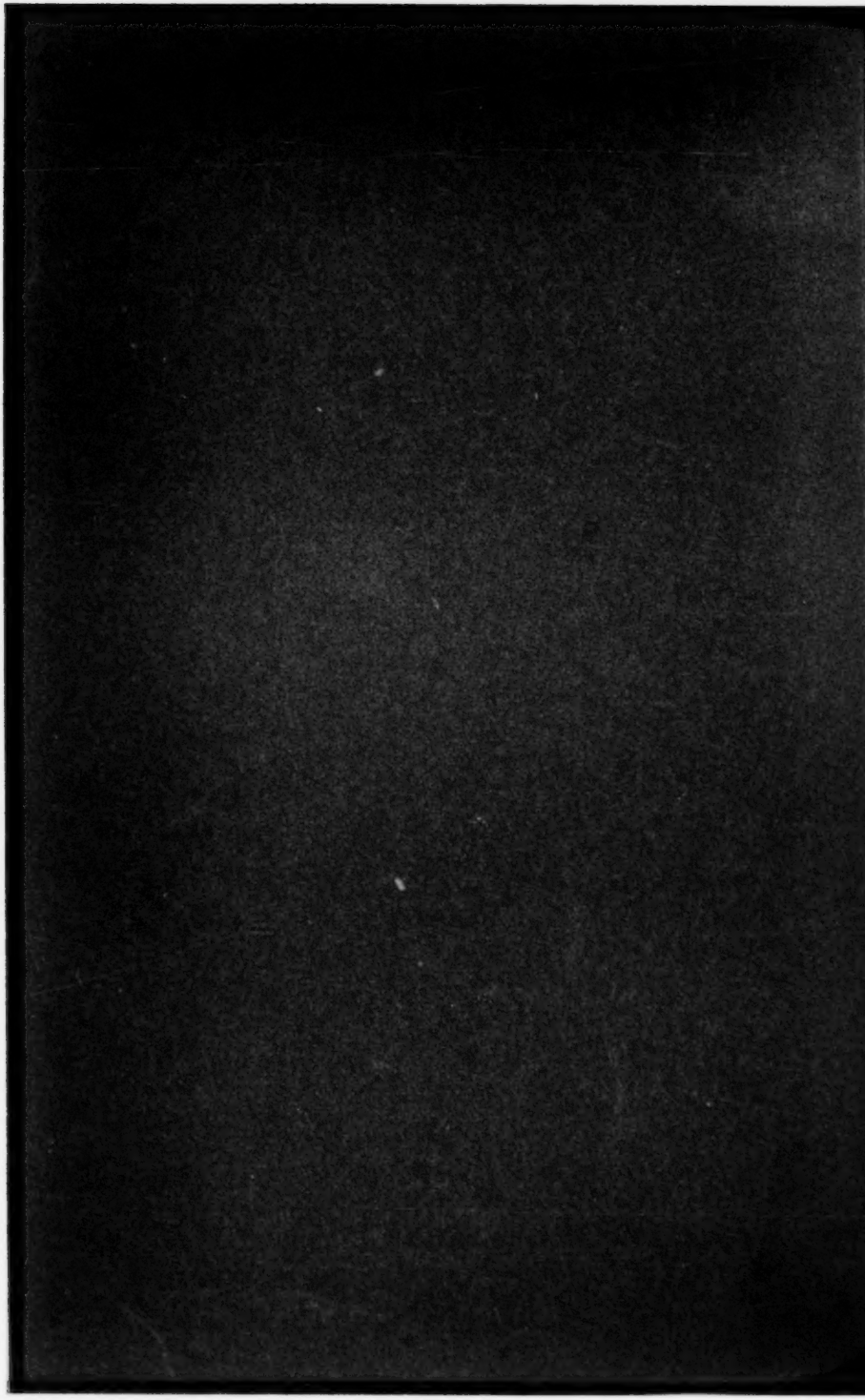

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.....

THE HUDSON MOTOR CAR COMPANY,
a Michigan Corporation; and
MOTOR WHEEL CORPORATION,
a Michigan Corporation,
Appellants,
vs.
GUSTAV C. HERTZ, Administrator c. t. a. of the
Estate of Lois Crane Hertz, etc.,
Appellee

On Petition for Writ of Certiorari to the United States
Circuit Court of Appeals, Sixth Circuit

REPLY BRIEF OF RESPONDENT

REFERENCE TO OFFICIAL REPORT OF CASE BELOW

The report of the opinion of the Circuit Court of Appeals for the 6th Circuit may be found in 121 Fed. (2nd) 326 *et seq.*

I.

REPLY TO ALLEGED GROUNDS UPON WHICH PETITIONERS ATTEMPT TO INVOKE THE JURISDICTION OF THIS COURT

In the District Court, a substantial judgment of upwards of nine thousand dollars was rendered, pursuant to the jury's verdict, in plaintiff's favor for damages resulting from the death of deceased caused by the collapse of a defectively manufactured automobile wheel.

Neither defendant objected on appeal to the merits of the verdict or judgment, but both defendants are attempting to avoid payment on the strictly technical ground that this action is barred by the Statute of Limitations of Virginia.

The instant appeal involves solely the question whether under the Death by Wrongful Act Statute of Virginia (being sections 5786, *et seq.*, Virginia Code of 1936) the one-year period in which the personal administrator of a deceased can sue the wrongdoer begins to run at the date of the death of the deceased, or whether it begins to run at the date of the appointment and qualification of the personal representative (who is the only one empowered by the Virginia Statute to bring suit).

There is no question involved bearing upon the construction of any Federal Statute or rule, nor upon any applicable decisions of this Court.

Nor is there any conflict between decisions of different Federal Courts upon this question.

Nor, since admittedly the courts of the commonwealth of Virginia have never construed the controlling provisions of the Death by Wrongful Act Statute, as amended in 1926 (Petitioner's Brief pp. 32, 36), can it be said that there is

any conflict between the decision of the instant case by the Circuit Court of Appeals and the applicable decisions of the Virginia Court.

The only conceivable ground for the instant Petition would be that the decision of the Circuit Court of Appeals is probably in conflict with general rules of statutory construction announced and applied by the Virginia courts under similar circumstances, but as yet not applied to the 1926 amendment to the Virginia Death by Wrongful Act statute under consideration.

We submit that the instant Petition and the applicable Virginia cases disclose no such conflict; and we further submit that even should such a question be thought to exist, it involves matters, merely local and private in their nature, lacking *in toto* the "peculiar gravity and general importance" necessary to justify a review by this Court on Certiorari.

II.

ADDITIONAL STATEMENT OF THE CASE

In this action, which is one brought by an administrator for damages for the wrongful death of the deceased due to the negligent construction of an automobile wheel, a judgment in favor of plaintiff below (appellee herein) was rendered by the trial court and sustained by the Circuit Court of Appeals for the Sixth Circuit (R. 105-106).

The pertinent facts are largely covered by Petitioners' "Summary Statement of the Matter Involved" (Petition for Writ of Certiorari, p. 2).

The instant case was commenced well within one year after the qualification of plaintiff-respondent as the per-

sonal representative of the deceased (R. 114). Before plaintiff-respondent was appointed and had so qualified, there was no one in existence with any authority to institute such a suit (1936 Virginia Code, sec. 5787: "Every such action shall be brought by and in the name of the personal representative of such deceased person * * *").

Prior to 1926, actions of this nature were required to be commenced within one year after the death occurred, the pertinent part of the statute reading as follows:

> "Section 5787.
>
> Every such action shall be brought by and in the name of the personal representative of such deceased person and within one year after his or her death * * *."

Hence, as the statute then stood, the one-year period of limitations commenced to run on the date of the death, without regard to the existence or non-existence of a personal representative.

In 1926, the Virginia legislature enacted Chap. 507, The Acts of Assembly, entitled "An Act to Amend and Reenact Section 5786 of the Code of Virginia, which Section is in Chapter 236 of said Code, in relation to Actions for Injuries." As a result of this Act, the pertinent parts of section 5786 (being the first section of the so-called Death by Wrongul Act statute, and the one which creates the action for wrongful death) thereafter read as follows, the portion italics being added by the 1926 Amendment:

> "Section 5786.
>
> "Whenever the death of a person shall be caused by wrongful act, neglect or default of any person or corporation * * *, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action * * *

> and to recover damages in respect thereof, then, and in every such case, the person or corporation * * * which, would have been liable, if death had not ensued, shall be liable to an action for damages, * * * notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. *And any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer and may be enforced against his executor or administrator, either by reviving against such personal representative suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death whether or not the death of the wrongdoer occurred before or after the death of the injured party.*
>
> *"Every action under this section shall be brought within one year next after the right to bring same shall have accrued, notwithstanding the provisions of Section 5818."*

Both the trial court and the Circuit Court of Appeals below agreed with respondent that since the Legislature clearly and unambiguously stated that "Every such action" should be brought within one year "next after the right to *bring* the same shall have accrued," it meant what it said (R. 113, 114).

Petitioners contend in effect that these clear words should be disregarded to the end that only those actions involving a deceased wrongdoer may be brought within one year after the right to *defend*—not to *bring*—the action shall have accrued by reason of the appointment of a personal representative of the deceased wrongdoer (Petitioners' Brief pp. 19-20, 30).

III.

ARGUMENT

Summary of the Argument

1. Since the instant case merely presents a question of construction of certain State legislation dealing with limitations on the commencement of private actions for Wrongful Death, and involves no question of a public nature or of "peculiar gravity and general importance," as defined by this Court, no appropriate occasion exists for this Court to be asked to take jurisdiction on certiorari.

2. The lower court correctly held that the only reasonable interpretation of the new limitation contained in the 1926 Amendments was that thenceforth *every action* for damages for wrongful death (including the new action created in the same amendment) might be commenced within one year next after the right to bring the same shall have accrued.

3. The lower court correctly held that in Virginia, as generally elsewhere, the right to bring an action cannot accrue until there is someone in being capable of suing, someone subject to be sued, and a tribunal in which to sue. Thus, until plaintiff-respondent had been appointed personal representative and had qualified, there was no one in being capable of suing, hence the one-year period did not begin to run until this took place and the suit is not barred.

POINT 1

It is elementary that no judgment of a Circuit Court of Appeals upon appeal from a United States District Court can be reviewed by this Court except by certiorari in the cases provided in section 347 of the Judicial Code.

28 U. S. C. A. sec. 347 (c).
1 Ohlinger, Federal Practice, p. 865.

This Court has many times held that the broad power and authority to review decisions of the Circuit Courts of Appeal on certiorari is one "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

Myers v. Bethlehem, etc. Co., 303 U. S. 41, 82 L. Ed. 639.

Furthermore, cases involving an attack in Federal Courts upon the decisions and general principles of law announced by the courts of one of the States upon matters of a local and private nature, are not the proper subjects of review by this Court on certiorari.

Forsyth v. Hammond, 166 U. S. 504, 41 L. Ed. 1095.
In re Woods, 143 U. S. 202, 36 L. Ed. 125.
Magnum Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922.

As this Court said in the *Magnum Co.* case, *supra,*

> "The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." p. 163.

The instant case comes clearly within the rule of the *Woods* case, which was one involving the construction of a state statute dealing with a private issue local to that state, upon which there was no disagreement between Federal courts or between federal and state courts.

The construction of the Virginia statute in this regard is just as much of a local and private matter as was the contruction of the Minnesota "*res adjudicata*" statute in the *Woods* case, *supra,* which this Court declined to review.

Therefore, clearly, a question in the instant case of the construction of the Virginia Wrongful Death statute does not involve matters of general importance or peculiar gravity so as to justify Petitioners in attempting to invoke the jurisdiction of this court.

POINT 2

The decision of the Circuit Court of Appeals in the instant case, far from being in conflict with the applicable principles of law as applied by the Virginia Supreme Court of Appeals, is in complete accord and harmony with the decisions of the latter court in the field of law involved.

As we have briefly pointed out, prior to 1926, the Virginia Wrongful Death statute contained among its provisions one which required an action for damages resulting from the death to be brought within one year *from the date of the death* (sec. 5787, Virginia Code of 1936). By chapter 507 of the Acts of Assembly for 1926, the Wrongful Death statute was amended, to accomplish two objects: (1) Survival of wrongdoer's liability and (2) alteration of the time at which the one year limitation period commences to run, the pertinent section of the amended statute reading as follows:

> "*Every* action under this Section shall be brought within *one year next after the right to bring the same shall have accrued* * * *." (Italics ours.)

This amending clause appears in section 5786 of the 1936 Virginia Code—the section which creates the action for wrongful death. No other pertinent amendments have since been enacted.

Clearly, where two statutes are in apparent conflict with each other and after reasonable construction cannot stand together, the latest expression of any legislature on a given subject should be respected and followed (*Williamson v. Wellman*, 156 Va. 417; *Xippas v. Commonwealth*, 141 Va. 497; *Forbes & Co. v. Oil Co.*, 130 Va. 245; *Gaines v. Marye*, 94 Va. 225; *Winn v. Jones*, 6 Leigh (Va.) 74). Equally as clearly, where a Legislature has employed words in a previous statute adequately expressing a certain meaning, but alters them in a later statute on the same subject, the Court must assume from the alteration that a change of the existing law was intended (*59 Corpus Juris*, p. 1050, sec. 620; *Hall v. Baylous*, 109 W. Va. 1; *Richmond v. Sutherland*, 114 Va. 688; *Southern Railway v. Casualty Co.*, 136 Va. 475). The fact that codifiers of the various statutes of a state carry prior inconsistent sections into the Code can have no effect upon the Legislative act (*Adkins v. Arnold*, 235 U. S. 417, 59 L. Ed. 294).

Therefore, Petitioners' lengthy and strained argument must fail, for both lower courts properly followed the rules of construction laid down by the Virginia courts in holding that by the amendment of 1926 the one-year period of limitations commenced "when the right to bring the (action) shall have accrued" as therein provided, rather than at the date of the death, as theretofore provided, thus giving effect to the latest expression of the Legislature on the subject.

Two inconsistent and repugnant statutes can stand together only in the event that both can be given a reasonable construction, and the purpose of each thereby accomplished.

City of Clifton Forge v. McDaniel, 143 Va. 325.
Scott v. Lichford, 164 Va. 419.

We submit that the construction contended for by the Petitioners is thoroughly unreasonable, for the following reasons, among others:

1. It completely disregards the clear, unmistakable language used by the Legislature when it provided in the 1926 Amendment that "*Every* action under this section * * *" could be commenced as the instant case was commenced. Petitioners argue that desire for uniformity of construction and application should be discarded, and that these plain words should be distorted so that only in those Wrongful Death actions where the wrongdoer also dies should the Amendment be given any effect.

2. It is based upon the underlying principle that where there is no defendant in existence to be sued, the right to bring an action cannot accrue until a personal representative is appointed for the defendant-wrongdoer, while in the same breath it unsuccessfully attempts to maintain Petitioners' position that such could not be the case where the injured party dies. We submit that the only reasonable construction of the limitation contained in the 1926 Amendment is the one made by the Circuit Court of Appeals in holding that if the right to bring an action cannot accrue until there is someone in being to be sued, neither, then, can it accrue until there is someone in being to bring the suit.

Therefore, clearly, the Circuit Court of Appeals' decision is in complete accord with the rules of statutory construc-

tion laid down by the Supreme Court of Appeals of Virginia in the *City of Clifton Forge, Scott, Williamson, Xippa, Forbes & Co., Richmond, Gaines and Winn* cases.

POINT 3

The question whether a right to bring an action can accrue under the 1926 Amendment before there is someone in being who is authorized to sue constituted the principal question of law in both lower courts. Both courts held that since no Virginia Court had yet passed upon the exact question in connection with the Amendment, the intention of the Legislature in the light of the general law of Virginia on the subject matter should be given effect (R. 114, 115); and they therefore held that the right to bring this action could not accrue until the appointment and qualification of respondent as the personal representative of the deceased (R. 110, 113-114).

Admittedly, Petitioners are unable to find authority in Virginia for their position (Petitioners' Brief, p. 36). As the Circuit Court of Appeals pointed out in its opinion (R. p. 113), the Virginia Wrongful Death cases cited by Petitioners were all decided prior to this 1926 Amendment, and hence have no bearing upon the question.

The intention of the Legislature in enacting the 1926 Amendment being the principal inquiry, the writers of the Brief inquired of the Honorable W. H. Nickels, Jr. (who as a member of the Virginia House of Delegates in 1926 sponsored the Amendment, and who is now Chairman of the Industrial Commission of Virginia), to advise us what was intended to be accomplished. As a matter of legislative history, the letter received from him was included in our Brief in the Circuit Court of Appeals; and for the same purpose, we include a photostatic copy herein on the following page.

It is clear from Mr. Nickels' letter that the Legislature intended by the Amendments to bring the Death by Wrongful Act Statute into line with the general law of Virginia relating to the time when the right to bring actions accrues.

As long ago as 1837, the court in *Hanford v. Elliott,* 9 Leigh (36 Va.) 79, held that a similar statutory period could not commence to run against a deceased heir's claim to a share in his ancestor's estate until a personal representative had been appointed and had qualified, where the representative was the only person who could lawfully bring suit to recover the heir's share, the court saying:

> "As to the Statute of Limitations, it could not, I think, oppose any obstacle to their (the heir's representatives) succeeding since the administration of Richard's (the heir) estate had been recent, *and the statute could not begin to run until administration,* as it would not run against Richard himself, he having died before the cause of action accrued." (Insertions and italics ours.)

The same rule was followed in *Lyons v. Magagnos* (1851), 7 Grattan (48 Va.) 377, where a legatee died shortly after the testatrix but before qualification of testatrix' administrator. The Court held that the Statute of Limitations did not bar the claim of the legatee even after the expiration of 12 years, since no one was in existence during that time who was capable of enforcing the claim and thus no cause of action for the legacy could accrue until such person came into existence.

Accord: *Lewis, Admr., v. Glenn,* 84 Va. 947, 979.
Bowles v. Elmore, 7 Grattan (48 Va.) 385.
Smith v. Charlton, 7 Grattan (48 Va.) 425.
Angell, Limitations, chap. VII, page 49.
2 Wood, Limitations, 4th Ed., sec. 199b, *et seq.*

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF WORKMEN'S COMPENSATION

INDUSTRIAL COMMISSION OF VIRGINIA

RICHMOND

ELS JR., CHAIRMAN
NSON
DEANS
EY, SECRETARY

May 3, 1941.

Mr. R. H. McNeill, Atty.-at-law,

1627 K. Street, N. W.,

Washington, D. C.

Dear Mr. McNeill:

In further reference to inquiry regarding amendment to Virginia Code, Section No. 5786, of which the writer was patron at the 1926 session of the General Assembly of Virginia, I wish to advise that it was my intention to provide that the limitation of one year fixed therein should not begin to run until after the personal representative had been appointed and qualified.

Otherwise, since the cause of action was given to, and could be instituted only by, the personal representative, the rights of the beneficiaries would be defeated.

Very truly yours,

W. H. Nickels, Jr.

N/Z.

Precisely the same rule is applied to limitations on the rights of a plaintiff who has been a minor or *femme couvert.*

Lynch v. Thomas, 3 Leigh (Va.) 682.
Baird v. Bland, 3 Munf. (Va.) 570.
Buford v. N. Roanoke Land Co., 90 Va. 418.

Therefore, since the Virginia definition of "accrual of a cause of action" or "accrual of the right to bring an action" requires a person in being capable and qualified to sue, and since the instant case was commenced well within the year following the qualification of plaintiff-respondent as personal representative of the deceased, we submit that unquestionably the lower courts properly held in accordance with Virginia law and that therefore appellants' argument raises no possible basis for applying for a writ of certiorari to this Court.

We submit that Petitioners' argument in this connection demonstrates itself to be unsound. In effect they say that the expressions "one year from the date of the death" and "one year from the time when the right to bring the action shall have accrued" mean the same thing, although the Legislature of Virginia enacted an amendment to the Wrongful Death Statute including a specific and separate paragraph devoted solely to the purpose of providing that thereafter the period should begin to run only from the time when the right to bring the action should accrue. In making this argument appellants have studiously attempted to disregard the provisions of section 5787 of the Code of 1936. This section, among other things, forbids anyone other than the duly appointed and qualified personal representative of the deceased from bringing an action under the Wrongful Death statute. To hold with appellants would be to say that the right to bring the action would, in every case, accrue before the existence of the only person authorized to bring it—the personal representative.

All of Petitioners' authorities were cited in the lower courts, and were thoroughly discussed in the Briefs. Suffice it to say that the Virginia authorities cited refer to the Wrongful Death Statute prior to the 1926 Amendment, as the Circuit Court of Appeals noted (R. p. 113); and the cases cited from other States were readily distinguished from the instant situation due to the wording of the statutes involved or to the status of the general law in the particular states.

The general rule in every state excepting California and New Jersey is that a right to bring an action cannot accrue until there is someone in being who can bring the action (74 A. L. R. 837n, referred to by the Circuit Court of Appeals in its opinion, R. 114).

CONCLUSION

Therefore, since the Petition fails to present any conflict between the decision of the lower courts and the Virginia law on the subject matter, and since it is clear that the decision correctly recognizes and applies the principles of law laid down by the Supreme Court of Appeals of Virginia, and, finally, inasmuch as the questions presented are of a local and private nature and are not of the peculiar gravity and general importance necessary to justify invoking this Court's jurisdiction, we submit that the Petition should be denied.

HAROLD H. EMMONS.
HAROLD H. EMMONS, JR.
ROBERT H. McNEILL.

Dated: December 8, 1941.